CHOW TAT MING & ORS

v.

BOUNTY DYNAMICS SDN BHD & ORS AND ANOTHER SUIT

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUITS NO: S6-22-145-2005 & S6-22-308-2006]
17 SEPTEMBER 2013

CIVIL PROCEDURE: *Affidavits - Cross-examination of deponent to affidavit - Application for - Deponents to affidavit faced contempt proceedings - Whether leave to cross-examine allowed - Whether judge had discretion to allow cross-examination - Rules of Court 2012, O. 38 r. 2(2)*

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Affidavits affirmed by comtemnors - Application to cross-examine comtemnors on affidavits - Whether questions proposed had bearing on issue in contempt proceedings - Whether judge had discretion to allow cross-examination - Rules of Court 2012, O. 38 r. 2(2)*

The plaintiffs obtained judgment against the first defendant after a full trial on 28 July 2011. On the same day, the holding company of the first defendant disposed its entire equity in the first defendant to a company called Liberal Bonanza Sdn Bhd. On 19 January 2012, the court ordered the first defendant to deposit a sum of RM22,400,000 into court within seven days ('the order'). The plaintiffs then obtained leave to commence contempt proceedings against the respondents for non-compliance of the order. The first and second respondents were directors of the first defendant/the third respondent at the time the action commenced. However, the first and second respondents resigned as directors of the third respondent and were replaced by the fourth and fifth respondents. Subsequently the first, second, fourth and fifth respondents affirmed and filed affidavits to set aside the leave and to oppose the contempt application. The plaintiffs' application herein was to cross-examine the second, fourth and fifth respondents on the affidavits pursuant to O. 38 r. 2(2) of the Rules of Court 2012 ('ROC'). The grounds to examine the respondents were (i) to ascertain the signature of the share sale agreement; and (ii) whether the transaction of sale was done to frustrate the judgment that the plaintiffs had obtained against the

first defendant. The respondents, however, argued that the court had no power to order cross-examination against a deponent facing contempt proceedings as contempt proceedings were quasi criminal in nature and it would be contrary to justice to compel a contemnor to give evidence. The respondents relied, *inter alia*, on the decision of *Comet Products UK Ltd v. Hawker Plastics Ltd And Another* (*Comet*'s case) to support its proposition. On the contrary, the plaintiffs argued that the cases cited by the respondents illustrated that the court had jurisdiction to order cross-examination and the fact that the deponent was a right person against whom leave to commence contempt proceedings had been granted was a factor to be taken into consideration in exercising its discretion under O. 38 r. 2(2) of the ROC. The question for determination was whether the court had power pursuant to O. 38 r. 2(2) of the ROC to order cross-examination of a deponent against whom a contempt proceeding had been instituted.

Held (dismissing plaintiffs' application with costs):

(1) In *Comet*'s case, it was decided that the judge had a discretion to require the contemnor to be subjected to cross-examination. It was only in exceptional cases that a judge ought to refuse an application to cross-examine a deponent on his affidavit. The *Comet*'s case was an exceptional one because the contemnor was faced with questions on collateral matters and not questioned on the alleged contempt. (para 12)

(2) When a person whose committal for contempt of court was sought, had affirmed and filed an affidavit in the contempt proceedings, he was not entitled as of right to decline to be cross-examined. The judge had a discretion under O. 38 r. 2(2) of the ROC to allow cross-examination on his affidavit and leave should be refused only in exceptional cases. Thus, the respondents' submission that the court had no power to order the cross-examination of a contemnor was misconceived and was contrary to the principles enunciated in *Comet*'s case. (para 15)

(3) This was an exceptional case as the plaintiffs' questions proposed to ask in cross-examination had little or no bearing on the issue in the contempt proceedings. Thus, leave was refused. It was imperative not to overlook that the alleged contempt here was respondents' failure to comply with the order to deposit the monies into court within seven days. The

reasons for the sale of the first defendant company and the signature of the share sale agreement were not relevant to the issue of contempt herein. (paras 16 & 17)

Case(s) referred to:

Comet Products UK Ltd v. Hawker Plastics Ltd and Another [1971] 1 All ER 1141 ***(refd)***

Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors [2007] 9 CLJ 373 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 38 r. 2(2)

Rules of the High Court 1980, O. 52 r. 2

For the plaintiff - Harwinder Kaur (Julian Chan with her); M/s AJ Ariffin Yeo & Harpal

For the 1st and 2nd respondents - Farez Jinnah; M/s Azim Tunku Farik & Wong

For the 3rd, 4th and 5th respondents - Rajindar Singh (Vincent with him); M/s Dennis Nik & Wong

Reported by Sandra Gabriel

JUDGMENT

SM Komathy Suppiah JC:

[1] This application raises a short but interesting question of whether the court has power pursuant to O. 38 r. 2(2) of the Rules of Court 2012 ("ROC") to order the cross-examination of a deponent against whom contempt proceedings have been instituted. The plaintiffs in this action had obtained leave to institute contempt proceedings against the respondents, who are the current and former directors of the first defendant company.

The Facts

[2] The first defendant is the developer/vendor of the plaintiffs' properties in a shopping complex known as the Summit Centre USJ, Subang Jaya, Selangor Darul Ehsan. In the year 2005, the plaintiffs, as purchasers, commenced legal proceedings against the first defendant for breach of its obligations under the sale and purchase agreements and the advertisement brochure. The first and second respondents were directors of the first defendant company/the third respondent at the time this action was commenced.

[3] Sometime in 2010, the first defendant changed its name from Meda Development Sdn Bhd to Bounty Dynamics Sdn Bhd without disclosing this fact to the court and the plaintiffs.

[4] The plaintiffs obtained judgment against the first defendant after a full trial on 28 July 2011.

[5] On the same day, Meda Incorporated Bhd, which was the holding company of the first defendant, disposed of its entire equity in the first defendant to a company called Liberal Bonanza Sdn Bhd for a cash consideration of RM1,000. The first and second respondents, who, at the material time were also directors of Meda Incorporated Bhd, executed the share sale agreement on behalf of Meda Incorporated Bhd whilst the fourth and fifth respondents represented Liberal Bonanza Sdn Bhd. The first and second respondents resigned as directors of the first defendant on the same day and were replaced by the fourth and fifth respondents.

[6] Some six months later, on 19 January 2012, Hue Siew Kheng J ordered the first defendant company to deposit a sum of RM22,400,000 within seven days into an interest bearing account in the joint names of the plaintiffs and the first defendant's solicitors.

[7] In July 2012, the plaintiffs obtained leave pursuant to O. 52, r. 2 Rules of the High Court 1980 to commence contempt proceedings against the five respondents for non-compliance of the order of 19 January 2012. The first, second, fourth and fifth respondents then affirmed and filed affidavits to set aside the leave and to oppose the contempt application. The present application by the plaintiffs is to cross-examine the second, fourth and fifth respondents on these affidavits pursuant to O. 38 r. 2(2) of the ROC.

Order 38 r. 2(2) ROC

[8] It will be useful to reproduce the provision on which the plaintiffs rely. Order 38 r. 2(2) ROC reads as follows:

> In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court May, on the application of

any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

The Arguments

[9] The respondents accept that O. 38 r. 2(2) of the ROC confers a discretion on the court to order cross-examination of a deponent. However, they take the position that the court has no power to order cross-examination against a deponent facing contempt proceedings. It is said that as contempt proceedings are quasi criminal in nature and may result in punishment, whether by imprisonment or fine, it would be contrary to justice to compel a contemnor to give evidence. In support of this proposition, reliance is placed on the decision of the English Court of Appeal in *Comet Products UK Ltd v. Hawker Plastics Ltd And Another* [1971] 1 All ER 1141 (*Comet*'s case) and the case of *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors* [2007] 9 CLJ 373; [2007] MLJ 250 (*Edmund Ming*'s case).

[10] The plaintiffs contend that the authorities cited by the respondents do not support the proposition that a contemnor cannot be cross-examined on his affidavit. On the contrary, the plaintiffs argue that the cases illustrate that the court has jurisdiction to order cross-examination and the fact that the deponent is a person against whom leave to commence contempt has been granted is a factor to be taken into consideration in exercising its discretion under O. 38 r. 2(2) of Rules of Court 2012.

My Decision

[11] In view of the position taken by the parties, it is necessary to examine the two decisions relied upon by the plaintiff.

[12] In *Comet*'s case, these were the brief facts. The plaintiffs had moved to commit Mr Hawkins for civil contempt. He filed an affidavit and used it at the hearing of his defence of the motion. The plaintiffs obtained leave to cross-examine him. He then appealed against the said order. The Court of Appeal (Lord Denning MR, Megaw and Cross LJJ) allowed the appeal and went on to set aside the order to cross-examine him. It was held that,

as Mr Hawkins had filed and read his affidavit, the judge had a discretion to require him to be subjected to cross-examination, and Cross LJ said that it was only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit. Having said that, the Court of Appeal held that the case was an exceptional one, not because Mr Hawkins faced being questioned on the alleged contempt, but because he faced questioning on a wide range of collateral matters.

[13] In this connection, it would be useful to refer to some observations made by Lord Denning MR (at p. 1145):

> So that brings me to the final question: ought a judge to rule that the second defendant should be cross-examined on his affidavit? It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case. I can understand that if the cross-examination could be limited to the particular circumstances of this alleged contempt, then it might be right to permit it. But in the course of the discussion, and particularly that of this morning, it has become plain that the plaintiffs, through their advisers, desire a much wider cross-examination than that. Counsel for the plaintiffs has referred us to the importance of a wilful intent, or a fraudulent intent, in passing off actions. He says that he wishes to prove that the second defendant intended to deceive. He quoted the well-known sentence of Lindley LJ 'Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?' Counsel for the plaintiffs wishes to cross-examine to show, not only that, in this new carton, the second defendant was intending to deceive, but also to show that he had the intent all the way along, and in particular that he had the intent in regard to the original Home Hair Trimmer.
>
> Now the question is: ought leave to be allowed to cross-examine the second defendant in such a way, and on such a scale, in these proceedings? Here we must have regard to the fact that this is in the nature of a criminal charge. It is not a claim to recover compensation from the defendants. It is a claim to enforce the injunction. The only permissible object of this application is to punish the second defendant – to impose sanctions against him – for wilful disobedience to an order of the court. When the defendant is faced with such a charge, I feel that the genius of the common law should prevail. The common law would not wish him to be cross-examined in the way that is suggested. Such a cross-examination would range over the whole of his state of mind on other occasions and in other circumstances, whereas the one

> issue is whether there has been a passing-off of this red carton. If this cross-examination were to be pursued, I can see question after question put, and objection after objection raised, extending over a long time. I do not think that would be appropriate in what in effect is a criminal charge of this kind. Therefore as a matter of discretion, as it is, the cross-examination ought not to be allowed. I think the judge would not have allowed it if he had known the range of cross-examination which it is sought to apply in this case.

Megaw LJ weighed in and said (at p. 1146):

> Therefore in my view the judge had a discretion under RSC Ord. 38, r. 2(3) whether or not to allow cross-examination of the second defendant on his affidavit. In general I think that in interlocutory proceedings, where there is a *bona fide* application to cross-examine a deponent on his affidavit, that application should normally be granted. There can be no suggestion here that the application on behalf of the plaintiffs is anything other than *bona fide*. But for the second defendant it was said that, against a person whose committal for contempt of court is sought, such an order should be made only in the most exceptional circumstances. I do not accept that. As a general proposition I think it is too widely stated. But the fact that it is a proceeding which may result in punishment, whether by imprisonment or fine or sequestration, is not irrelevant. It is a proper factor to be taken into consideration by the judge, along with other factors, in proceedings such as this where an application for cross-examination is resisted. What weight it will have must depend on the circumstances of the particular case. In some cases it may have little or no weight. One feature which may make it of substantial weight is when it becomes apparent that the necessary result of the cross-examination, while the cross-examination is perfectly properly conducted, is likely at the best to have a very small relevance to the issue which the judge has to decide in comparison with the effect it may have on the matters in the litigation, which are not properly in issue on the contempt motion. That in my view, agreeing with Lord Denning MR, is the case here, as has become clear before us.

[14] Turning now to *Edmund Ming*'s case, the court in dismissing an application by the petitioner to cross-examine the respondent on his affidavit in reply to a committal application said (at p. 390):

> On the question whether leave to cross-examine could be allowed on 'contempt affidavits', due to the grave penal consequences which may result from the court's finding against the said respondents, I am *ad idem* with and I would adopt the views of

Lord Denning MR in *Comet Products UK Ltd v. Hawkex Plastics Ltd & Anor* [1971] 2 QB 67 ('*Comet Products*'). Though this authority is not binding on this court, the rationale therein was so cogently argued by Lord Denning that it is compelling on me to follow:

> Consequently, I hold that the second and fourth Respondents are not compellable witnesses in this contempt proceedings, unless they choose to do so, as happened in *Dr Leela Ratos & Ors v. Anthony Ratos* [1997] 1 MLJ 704. In any event, I am of the considered view that to allow the petitioner to cross-examine the respondents on encl. 182A or any of the previous affidavits would operate unfairly and would be prejudicial against the alleged contemnor as it would be difficult to restrict such cross-examination to only the circumstances of the committal hearing so as to ensure that such exercise would not be for a collateral purpose. Unrestricted cross-examination would have little relevance to the petitioner's allegations of contempt and would be severely prejudicial to the said respondents since it would lead to an examination of the whole circumstance of the petition itself. In the *Comet Products*, the UK Court of Appeal disallowed cross-examination of the contemnor because the cross-examination could not be limited to the circumstances of the committal hearing, but would have led to an investigation of the whole circumstances of the original action.

[15] In *Edmund Ming*'s case, the primary view of the court was that the respondent was not a compellable witness in light of the principle established in *Comet*'s case. I am constrained to say that in my view this interpretation does not accord with the decision in *Comet*'s case. It is clear from the passages that I have reproduced from *Comet*'s case that the principle enunciated here is that when a person whose committal for contempt of court is sought, affirms and files an affidavit in the contempt proceedings, he is not entitled as of right, to decline to be cross-examined. The judge has a discretion under O. 38 r. 2(2) ROC whether to allow or not cross-examination on his affidavit and leave should be refused only in exceptional cases. Thus, the submission of the respondents that the court has no power to order the cross-examination of a contemnor is misconceived and is contrary to the principles enunciated in *Comet*'s case.

[16] However, in the instant case, I refused to grant leave because this is an exceptional case as the questions that the plaintiffs propose to ask in cross-examination have little or no bearing on the issue in the contempt proceedings. The plaintiffs propose to examine the second respondent to ascertain the reason for the sale of the first defendant/third respondent to Liberal Bonanza Sdn Bhd on the same day that judgment was entered against the company, and if this transaction was done to frustrate the judgment that the plaintiffs had obtained against the first defendant. In addition, the plaintiffs also propose to examine the fourth and fifth respondents to ascertain whether they were authorised to sign the share sale agreement as directors of Liberal Bonanza Sdn Bhd, and if they conspired with the former directors to deprive the plaintiffs of the fruits of judgment.

[17] It is imperative not to overlook that the alleged contempt here is the failure of the respondents to comply with the order of Justice Hue Siew Kheng J made on 19 January 2012 to deposit the monies into court within seven days. The respondents were represented by solicitors when the said order was made. Consequently, the reasons for the sale of the first defendant company to Liberal Bonanza Sdn Bhd and why the fourth and fifth respondents had signed the share sale agreement as directors of this company are not relevant to the issue of contempt here.

Conclusion

[18] For these reasons, I dismiss the application with costs of RM2,000 to each set of respondents.